2005

Robert L. Joseph v. David L. McCann, M.D., F.A.P.A. : Brief of Appellant

Utah Court of Appeals

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20050979-CA

UTAH COURT OF APPEALS

ROBERT L. JOSEPH,

Plaintiff and Appellant,

vs.

DAVID L. McCANN, M.D., F.A.P.A.

Defendant and Appellee.

BRIEF OF APPELLANT

Appeal from the Final Order and Judgment of the
Third Judicial District Court, Salt Lake County
State of Utah, by the Honorable Judith S.H. Atherton

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ORAL ARGUMENTS AND PUBLISHED OPINION NEEDED

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IN THE UTAH COURT OF APPEALS

ROBERT L. JOSEPH, Plaintiff and Appellant, vs. DAVID L. McCANN, M.D., F.A.P.A., Defendant and Appellee.	)	**BRIEF OF APPELLANT** Case No. 20050979-CA

PRELIMINARY STATEMENT.

This is an appeal of a trial court's grant of summary judgment and post-judgment refusal to alter or amend judgment on the bases of "duty" and statute of limitations disputes in a medical malpractice action Robert Joseph, a former Salt Lake City Police Officer, filed against David L. McCann, M.D., F.A.P.A. On appeal is the question that can a claimant present a fraud cause of action after a previous negligence claim was time-barred when it was discovered after litigation commenced that the doctor had fraudulently concealed his tortuous misconduct. In this matter, the doctor's conduct was concealed that he was retained by SLC to act as an "expert witness" for SLC against Joseph in the former employers' scheme to discharge the officer. The second question before the Court is, does the Utah Health Care Malpractice Act (UHCMA), § 78-14-1 et

seq. create a duty for an admitted health care provider who while claiming to be an independent medical examiner, but who in this case, specifically and expressly identified Joseph as his patient, who was acting under a contract to perform a specific act involving the forensic psychiatric evaluation and fitness of the Plaintiff. The forensic psychiatric service provided was similar to others relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment.

STATEMENT RELATED TO OTHER APPEALS

1) The mental health evaluation or otherwise known as the "fitness for duty examination" was the subject matter of the related appeal *Joseph v. Salt Lake City Civil Service Comm'n*, 53 P.3d 11 (Utah Ct. App. 2002). (Case No. 20010399-CA). The report contained deliberately false diagnoses, not just information negligently concluded.

As the published opinion reflects, Appellate Judge William A. Thorne quoted the report:

> [He] has Disordered Personality Traits which have contributed to him placing himself in jeopardy in the shooting incident and in other incidents. Officer Joseph's personality traits have caused him to be excessively self-centered and unwilling to learn from peers or superiors. His personality traits are likely to lead him to increased isolation and alienation from appropriate professional supervision and the needs of the citizens of Salt Lake City. Personality traits similar to those of Officer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision or disciplinary action. His personality traits cause an increased risk for harm to himself, to other officers and to the citizens of Salt Lake City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer.

Id., at 13-14. (R. at 140). (ATTACHMENT C). Prior to filing Mr. Joseph's medical malpractice action, Plaintiff believed the determination was the result of negligence. (R. at 87, ¶8; 131; 174; 177-79; 193; 195-96). After the commencement of the lawsuit and after discovery exchanged,

Dr. McCann, a health care provider, revealed evidence demonstrating that his evaluation was the result of fraud, not previously made known to Mr. Joseph. (R. at 92; 177; 186-87)

2) Robert L. Joseph's 20-day suspension appeal from the Salt Lake City Civil Service Commission was case no. 2001111-CA *Memorandum Decision* (filed July 26, 2002) (Unpublished). (ATTACHMENT D). Because the evidentiary threshold for civil service commission hearings is so low, on appeal the decision was upheld. The "substantial evidence standard" is the burden of proof is civil service proceedings. *Lee v. Provo City Civil Serv. Comm'n*, 582 P.2d 485 (Utah 1978). See also, *Schmidt v. Utah State Tax Comm'n*, 980 P.2d 690 (Utah Ct. App. 1999) ("The court must review the Commission's findings of fact under a 'substantial evidence' standard. (citations omitted). In other words, the court of appeals must uphold those findings of fact that are supported by substantial evidence, or 'that quantum and quality of relevant evidence which is adequate to convince a reasonable mind to support a conclusion.' (citations omitted). The court of appeals must review the Commission's conclusions of law for correctness. (citations omitted by the court)."

In that matter based upon the quantum of evidence presented, the record when viewed as a whole, the Commission upheld Robert Joseph's 20-day suspension determining that their was substantial evidence demonstrating that Joseph did violate department policy when he shot at or from a moving vehicle. The question of law whether Joseph was "justified" in the use of deadly force pursuant to Utah Code Ann. § 76-2-404 (1953, as amended) was not decided by the commission.

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by *Utah Code Ann.* § 78-2-2(4) (1953, as amended). (The Court of Appeals has jurisdiction over matters transferred to it by the Utah Supreme Court). The Order of the Court granting summary judgment is ATTACHMENT A. The Order denying to alter or amend judgment is ATTACHMENT B.

STATEMENT OF ISSUES.

(1) Whether defendant, David L. McCann, M.D., F.A.P.A. owed plaintiff, Robert L. Joseph, a duty of care during his assessment, evaluation, and report of Mr. Joseph "fitness for duty" as a police officer, or is McCann free to make any false, salacious or malicious statements about Mr. Joseph he wanted? Plaintiff contends that the UHCMA created a duty where the health care provider (1) called Plaintiff a "patient," (2) acted under signed contract, and (3) performed a service (the forensic psychiatric evaluation) typically rendered by others providing similar to care or services.

(2) Whether defendant, David L. McCann's statute of limitation's affirmative defense was waived concerning plaintiff, Robert L. Joseph's negligence claim, and that the statute of limitations was tolled by Dr. McCann by his fraudulent concealment of misconduct. The discovery occurred during the discovery phase of litigation. At that time, plaintiff discovered that Dr. McCann acted fraudulently by both misrepresenting himself as independent and through material omission of "confidential" correspondence between he and the city? Plaintiff contends "yes." The statute of limitation affirmative defense was waived by the latter discovery that Dr. McCann's fitness for duty report of Joseph was planned and not the product or result of an

impartial assessment and evaluation. The typical forensic psychiatric evaluation requires disclosure of materials provided for consideration. In this matter, "confidential" material was not disclosed until during discovery in litigation commenced and he did not reveal he was hired to be SLC's "expert witness." Section 78-14-4(1)(b) is the exception applicable in this matter which forms the basis of this court's decision to remand the matter to the trial court.

STANDARDS OF REVIEW.

This is an appeal of the trial court's award of summary judgment to the moving defendant. The well-established law requires the fact be interpreted in the light most favorable to the non-moving party:

> In this appeal, we review four questions: whether the district court (1) correctly concluded that the duties at issue were tort, rather than contractual, duties because they existed at common law independent of any contract or agreement, (2) applied the appropriate statute of limitations period, (3) correctly granted CRG's summary judgment motion, and (4) acted within its discretion in denying the County's rule 56(f) motion for a continuance. The first three questions present issues of law. We therefore review them for correctness and give no deference to the district court's conclusions. *See State v. Tooele County*, 2002 UT 8, P8, 44 P.3d 680 (stating that a district court's grant of summary judgment is reviewed for correctness); *Estes v. Tibbs*, 1999 UT 52, P4, 979 P.2d 823 (holding that a district "court's application of a statute of limitations presents a question of law"); *Weber v. Springville City*, 725 P.2d 1360, 1363 (Utah 1986) (explaining that the "question of whether a 'duty' exists is a question of law"). We review the final question under an abuse of discretion standard, however. *Crossland Sav. v. Hatch*, 877 P.2d 1241, 1243 (Utah 1994).
>
> P17 In reviewing the district court's summary judgment ruling, we add that the court's decision can be upheld only if no genuine issues of material fact existed and CRG was entitled to judgment as a matter of law. Utah R. Civ. P. 56(c).

Salt Lake County v. Western Dairymen Coop, Inc., 48 P.3d 910 (Utah 2002).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.

Utah Code Ann. § 78-14-1 (2002)

Utah Code Ann. § 78-14-4 (2002)

Utah R.Civ. P. 56

Utah Code Ann. § 78-25-25 (2002)

STATEMENTS OF THE CASE.

I. Nature of the Case:

This case arises from the trial court's grant of summary and apparent desire for an appellate court to create precedent authority in Utah concerning the question of whether under the UHCMA, physicians representing to act as an independent medical examiner (IME) owe a duty of care to admitted "patients" under contract for services they provide which is similar to other physicians. Joseph believes that the trial court was proper to want stare decisis out of this Court – the question is an important question of state law.

At the oral arguments hearing for summary judgment the colloquy concerning a physicians duty went:

> MR. EYRE: I will be brief and leave plaintiff's counsel some time. The other issues has to do with this notice of basically exert witness malpractice, is what it amounts to, and every court in the country that has addressed this has said there is no legal duty, there are ample public policy reasons for this; namely, if you start allowing the losing party in a controversy or lawsuit to sue the experts on the other side it will have a chilling effect on access to the courts and it would stem or start an endless flow of litigation. Unfortunately, there is not a Utah case directly in point.
>
> THE COURT: Why?

(T. at 8).[1]

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[1] The transcript is marked as "T" because the individual pages except for the front cover has a record pagination. The transcript cover itself is marked as, the record at 590.

II. Course of the Proceedings:

This matter commenced on October 14, 2003 by the filing of a Complaint for medical malpractice consisting of 56 paragraph allegations. R. at 3-12. Defendant, David L. McCann, M.D., F.A.P.A. filed an Answer on November 14, 2003; it was largely non-responsive to the allegations pled by plaintiff. R. at 15-20. Within the Answer, at paragraph 13, denies acting negligent, but nowhere within the Answer does Dr. McCann acting fraudulent as alleged in Joseph's paragraphs 45-51. (R. at 9-10, 18).

Following the closure of the parties' pleadings, discovery commenced. On January 25, 2004, defendant disclosed a copy of his files. Within the files, was included a letter from Lyn Creswell, one of city's attorneys for Salt Lake City. Salt Lake City was Joseph's former employer as this Court is aware from the companion case *Joseph v. Salt Lake City Civil Serv. Comm'n*, 53 P.3d 11 (Utah Ct. App. 2002). (Case No. 20010399-CA).

The letter, dated January 31, 2000 was marked "CONFIDENTIAL" and was never previously or subsequently disclosed by Salt Lake City for any reason. R. at 193. Mr. Creswell addressed the letter to Dr. McCann. The doctor did not reveal the letter as part of the materials received as part of his report, consistent with the standards and practices accepted by this Court, the Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition (DSM-III), then published. *See State v. White*, 880 P.2d 18, 24 n. 2 (Utah Ct. App. 1994). Also, admittedly Dr. McCann represented to Joseph to conduct himself pursuant to the Ethical Guidelines for the Practice of Forensic Psychiatry. (R. at 128).

Following discovery, the defendant, Dr. McCann, moved for summary judgment on June 7, 2004. (R. at 82-143.) Plaintiff, Mr. Joseph, responded opposing summary judgment on July

27, 2004. (R. at 174-213). The response included an affidavit from another physician and attorney, Robert K. Rothfeder, M.D., J.D. He submitted documentary evidence opposing summary judgment opposing Dr. McCann's claim that he had no legal duty of care to Mr. Joseph during his psychiatric evaluation, assessment, and reporting identifying two bases for a duty, one being the UHCMA and the other being HIPAA, an act of the Congress. (R. at 202-06). The memorandum also had attached a copy of the "CONFIDENTIAL" letter of Salt Lake City Attorney, Lyn Creswell (which was disclosed for the first time in this litigation). (R. at 193). Dr. McCann filed his reply memorandum on August 9, 2004. (R. at 304-22). Additionally, on October 6, 2004, Mr. Joseph filed supplemental memorandum in opposition to summary judgment. (R. at 384-413). That memorandum contained excerpts of Dr. McCann's testimony from his March 10, 2004 deposition. (R. at 390-403). Additionally, Joseph provided the excerpt of Mr. David Greer's testimony. Greer was, at that time, the Salt Lake City Union Representative. McCann's report indicated receiving information from an interview with Mr. Greer. Mr. Greer, however, testified never speaking to Dr. McCann. (R. at 407-13, 411).

Once the motion was submitted for decision, the Court conducted a hearing giving the parties' an opportunity for oral arguments. The hearing was heard on January 27, 2005. (R. at 590). During oral arguments, the Court was reminded about the discovery of fraud matter being realized from the January 25, 2004 disclosure of the Lyn Creswell letter.

MR. OLIVER:

> . . .on January 25th, on January 25th, we're informed at that time of the Lynn (sic) Creswell matter, we're also told - - January 25, 2004 - - we're also told at that time that Dr. McCann has relied on the representations of the union representative and that is shown Officer Greer and Officer Greer in his testimony said he never spoke with Dr. McCann. So as we have gone through this process, the discovery actually of the malpractice is still ongoing because we're finding this out even

> after we filed the action. Now, I don't think that post-discovery is what we're talking about but I am showing the Cour that so that the Court understands that even with our latest discovery process that we gone through with Dr. McCann, we're still in the process of finding that statements made and relied upon or apparently relied upon were inaccurate.

T. at 15-16.

At the end of the hearing, the court granted summary judgment making her findings. (T. at 22-24). Nowhere did the judge address the issue of discovering the existence of a fraud or that the motion for summary judgment actually had been filed untimely essentially waiving the dismissal on that grounds.

A Summary Judgment order was entered on April 25, 2005. Following the entry of the order, on May 4, 2005, Mr. Joseph moved the court to alter judgment to address the fraud discovery claim previously ignored by the court at oral arguments. (R. at 555-67). Dr. McCann opposed the motion on May 18, 2005. (R. at 569-75). The court denied the motion on September 27, 2005, claiming plaintiff "once again argues the issue of the tunning of statute of limitations. Plaintiff raises no new issues regarding the statute of limitations . . . nor does he allege any legal error. He simply seeks to have this Court reconsider its ruling. This Court finds no basis to do so." (R. at 579).

III. Disposition in Trial Court:

Summary Judgment was awarded to the Defendant on both the grounds that statute of limitations had run and that Dr. McCann acted as an IME, an expert witness only for Salt Lake City and therefore owed no duty at all to Mr. Joseph. However, disputed before the Court was whether Dr. McCann through material omissions and false misrepresentations, one, effectively

tolled or waived the statute of limitations defense through fraudulent acts; and, two, violated the UHCMA rising to a level of a cause of action as defined in the Act. "'Tort' means any legal wrong, breach of duty, or negligence or unlawful act or omission proximately causing injury or damage to another." Utah Code Ann. § 78-14-3(32) (2002).

IV. Statements of Fact:

Plaintiff became employed by Salt Lake City as a Police Officer in 1997. (R. at 97-121, 98). In March 1999, Officer Joseph was involved in an incident wherein he shot and injured a motorist while acting under color of authority as a Salt Lake City Police Officer. (R. at 3-12; 4; 15-20; 16; 99-100). As a result of the shooting incident, Joseph was suspended by Salt Lake City as a Police Officer. (R. at 101; 123). In January 2000, SLC reinstated Officer Joseph as Police Officer. As part of this reinstatement, Plaintiff was required to submit to a fitness for duty evaluation and was ordered to report to Dr. David L. McCann, the defendant. (R. at 6; 102; 125). Dr. McCann is a medical doctor and has a specialty in the field of Psychiatry. In January 2000, Dr. McCann was retained by SLC in his professional capacity to perform the "fitness for duty" mental health examination upon Mr. Joseph. (R. at 86; 128).

Dr. McCann required Mr. Joseph to sign a contract and then he performed his performed his evaluation of Plaintiff on February 3, 2000; it lasted for approximately two (2) hours. (R. at 128). The first hour plaintiff acted guarded and said little; the second hour, Plaintiff opened up and a free conversation exchanged. (R. at 195-96; 394-400). However, Plaintiff disputes that Dr. McCann acted impartially or independently contrary to the representations he made in the

evaluation and in his contract.[2] An expert witness for SLC was never the expressed intention. (R. at 125). Plaintiff admits that Dr. McCann reviewed partial employment records and some related materials furnished to Dr. McCann by SLC. Dr. McCann also had psychological testing done and performed an interview of Plaintiff. (R. at 195; 394). At the time of the fitness for duty evaluation, Plaintiff did acknowledge that Dr. McCann's role was to provide his assessment to SLC and "not treatment" to Plaintiff. (R. at 128). Dr. McCann completed his report on February 28, 2000 and provided the same to SLC. (R. at 195; 393). The alleged examination included a review of employment and related materials furnished to Dr. McCann by SLC, through Lyn Creswell, a Salt Lake City Assistant Attorney. (R. at 195). Dr. McCann also had psychological testing done and performed a psychiatric interview of Plaintiff. (R. at 86). At the time of the interview, Joseph acknowledged that Dr. McCann's role was to provide his assessment to SLC and "not treatment" to Mr. Joseph. (R. at 103-04; 128). Dr. McCann completed his fitness for duty report on February 28, 2000 and provided the same to SLC. (R. at 195). See Defendant's Exhibit "D," (ATTACHMENT E), referring to Joseph as a "patient." (R. at 128).

Based upon Dr. McCann's "fitness for duty" report, and McCann's opinion that "Officer Joseph [was] not psycholigically suitable to perform the duties of a police officer," hence SLC terminated Mr. Joseph as a Police Officer on March 31, 2000. *Joseph v. Salt Lake City Civil*

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[2] In litigation, Dr. McCann has abandoned the position of acting as an IME arguing in stead that he was hired to be an "expert witness" for SLC. R. at 92. The fact is that position is controverted by McCann's own exhibits. Defendant's Exhibit "C" is SLC's reinstatement letter ordering Mr. Joseph to submit to a "fitness for duty evaluation." Defendant's Exhibit "D" is McCann's contract for hire, identifying himself as an IME, identifying Joseph as his "patient," professing to conduct himself under the Ethical Guidelines for the Practice of Forensic Psychiatry; and admitting by reference to Utah Code Ann. § 78-25-25 (2002) that McCann was a health care provider, Joseph was a patient and he intended to provide a copy of Joseph's patient records to SLC.

Serv. Comm'n, 53 P.3d 11 (Utah Ct. App. 2002) (R. at 140). (R. at 9; 17; 86). A copy of Dr. McCann's report was provided to Plaintiff and his attorney on or about March 14, 2000. (R. at 87; 178). Plaintiff and his attorney consulted three Psychologists concerning Dr. McCann's report. (R. at 87). Information obtained from these consultations caused Joseph to believe that Dr. McCann was "in error" in his evaluation. (R. at 131). On April 5, 2000, Plaintiff, through his attorney, appealed his termination by SLC as a Police Officer to the Salt Lake City Civil Service Commission. (R. at 130-133). As part of the Request for Appeal, Mr. Joseph contended that Dr. McCann was at fault in connection with the fitness for duty evaluation. Plaintiff alleged in part as follows:

> Dr. McCann did not conduct a complete and competent evaluation . . . . The evaluation is incomplete and inadequate.

(R. at 130-33; 131). The Salt Lake Civil Service Commission rules require an appeal within 5 days. As a result, Plaintiff, through his attorney, appealed his termination by SLC and had to alleged something, even speculate. (R. at 179). The logical inference is that under pressure of an employment appeal, Joseph was speculating; that is not notice. He stated that at the time the allegations were raised about Dr. McCann no consultations had taken place. A consultation with Dr. Stephen Golding did not take place until after new counsel, Erik Strindberg, was retained on October 25, 2000. Mr. Strindberg researched the issue and at his request, between November to December 2000 Dr. Golding was consulted. (R. at 114; 179). Another logical inference is that Golding could never opine as to intent, just demonstrate negligence at best.

The only apparent belief at that time due to material omissions from both SLC and Dr. McCann was that Dr. McCann's report was negligent in conducting his evaluation. (R. at 168). Moreover, due to the material misrepresentation that he was acting as an Independent Medical

Examiner and that Joseph was specifically referred to as a "patient" on the same document, Plaintiff was led to believe that McCann was or would be acting impartially and never was told he was acting as SLC's expert, no pending legal matters suggested a need for a defendant's expert. (R. at 128).

During his civil service appeal, Mr. Joseph failed to comply with discovery requests from SLC while his case was pending before the Commission. Accordingly, on April 9, 2001, the Commission entered an Order dismissing Plaintiff's appeal of his termination. (R. at 119; 135). As this Court is aware from the companion case, *Joseph v. Salt Lake Civil Serv. Comm'n*, 53 P.3d 11 (Utah Ct. App. 2002), that order precluded Officer Joseph from a review of the civil service appeal on the merits. The action of SLC in terminating Plaintiff as a Police Officer and the Commission in dismissing Plaintiff's appeal of that termination was affirmed by the Utah Court of Appeals in *Joseph v. Salt Lake Civil Serv. Comm'n*, 53 P.3d 11 (Utah Ct. App. 2002). (R. at 140) (R. at 120-21; 138)

On April 23, 2003, Mr. Joseph initiated his claim against Dr. McCann for medical malpractice by filing a Notice of Intent to Commence Legal Action and contemporaneously filing a Request for Prelitigation Screening Panel with the State of Utah, Division of Occupational and Professional Licensing. These papers were served and filed in accordance with the provisions of the Utah Health Care Malpractice Act, § 78-14-1 et seq. (R. at 88; 179; 198-200).

The April 23, 2003 Notice of Intent to Commence Legal Action was Plaintiff's third attempt to comply with the provisions of the Utah Health Care Malpractice Act, § 78-14-1 et seq. Prior to this action, Plaintiff's counsel missed the filing deadline for the first Request for Prelitigation Review for the September 23, 2002 notice; the second Request for Prelitigation

Review for the February 9, 2003 notice was somehow lost during DOPL's reconstruction and move from the third floor of the Heber Wells Building to the first floor. Therefore, a third notice and contemporaneous filing was conducted on April 23, 2003. (R. at 198-200).

Following, Mr. Joseph filed his complaint on October 14, 2003, and Dr. McCann answered on November 14, 2003. Then on January 25, 2004, during discovery, Joseph received for the first time, the "CONFIDENTIAL" Lyn Creswell letter from SLC, along with other materials from his patient records not otherwise previously disclosed to him.[3] That was first notification and disputable evidence of McCann's fraudulent involvement to fire Mr. Joseph from the police force – that he had acted as an agent for SLC. At no time during Mr. Joseph's alleged IME by Dr. McCann nor following was Mr. Joseph apprized of the letter's existence. Even Dr. McCann's February 28, 2000 report failed to disclose the existence of letters having been submitted or relied on. (R. at 195). And even though Plaintiff has been involved in for five separate legal actions with SLC, SLC has never revealed it to Plaintiff and likely never would. (R. at 177; 193).

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[3] Dr. McCann's Exhibit "D" – his contract for the fitness for duty evaluation and patient consent form references Utah Code Ann. § 78-25-25 (as amended) which identifies whether expressed or implied that McCann was a Joseph's health care provider, Joseph was his patient, and that McCann intended to provide a copy of his "patient's records" to SLC.

SUMMARY OF THE ARGUMENTS

Issue One: Defendant McCann Owed Plaintiff Joseph a Duty Under UHCMA.

In this matter, Dr. McCann's own evidence, and particularly his Exhibit "D" establishes that Dr. McCann owed Joseph a duty to be fair and impartial as any other practicing physician providing care or services to his patient. In this matter, the doctor under contract was hired by SLC to perform a fitness for duty evaluation upon Officer Joseph, one of SLC's employees. On February 3, 2000, Officer Joseph signed Dr. McCann's contract and consent form. The contract expressly and impliedly represented that, one, Plaintiff was McCann's "patient," he was not evaluated for purposes of "treatment," but was being evaluated for "fitness for duty." The service provided was similar to that of other practicing physicians and psychiatrists performing Forsenic Psychiatry. That contract and consent agreement also by reference to Section 78-25-25, Dr. McCann admits being a "health care provider" and that he needed Joseph's, McCann's patient, consent to release a copy of the "patient's records" to SLC.

As a matter of law, the definitions of both "patient" and "health care provider" are synonymous in Section 78-25-25 and 78-14-3. As a matter of fact, 78-25-25, specifically cites to the definition of health care provider on 78-14-3. Based upon the totality of the circumstances, Plaintiff was believing Dr. McCann owed him a duty under UHCMA.

Issue Two: Defendant McCann Waived Statute of Limitations as an Affirmative Defense.

Defendant moved for summary judgment claiming that more than two years had passed from the time Mr. Joseph had notice of Dr. McCann's "error." However, that claim of error was not adequate notice that a reasonable person can be held to under the circumstances where as here the Plaintiff was defrauded unknowingly by the Defendant health care provider.

In this matter, the Plaintiff was not apprized of his recoverable injuries or the origins of the tort committed by Dr. McCann. The discovery of Dr. McCann's agency or "expert witness" status was not made known to him until after litigation commenced. The complaint was filed on October 14, 2003, the discovery that Joseph had been defrauded by McCann was not disclosed to him until January 25, 2004. The motion for summary judgment was not sought until June 7, 2004. The motion was not timely pursued an effectuated constituted a waiver of the defense. By that time, Defendant's tort violation of UHCMA was discovered and Joseph's cause of action survives under Utah Code Ann. § 78-14-4(1)(b).

ARGUMENTS

SUMMARY JUDGMENT WAS IMPROPER IN THIS MATTER

POINT ONE. THE EVIDENCE, CONTEXT OF THE TOTALITY OF THE CIRCUMSTANCES, AND THE LOGICAL INFERENCES FROM THE EVIDENCE DICTATE THAT DR. McCANN, AN ADMITTED HEALTH CARE PROVIDER OWED JOSEPH A DUTY UNDER THE U.H.C.M.A. BECAUSE JOSEPH WAS HIS PATIENT, ACTED UNDER CONTRACT AND PERFORMED A PSYCHIATRIC SERVICE CONCERNING HIS FITNESS SIMILAR TO THAT OF OTHER HEALTH CARE PROVIDERS.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of informing the court of the basis for its motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the nonmoving party then fails to make a sufficient showing on an essential element of the case to which it bears the burden of proof at trial, the moving party is entitled to judgment as a matter of law. *Id.* at 323. **In considering summary judgment the trial court does not weigh the evidence and determine the truth of the matter. Rather, the court inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party.** *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). (emphasis added). In this matter, the parties are not in agreement with the claimed undisputed facts. And the conclusions of law were incorrectly drawn from the facts presented.

This Court should review for correctness, the trial judge's decision concerning both issues before this Court, to wit: (1) Whether Dr. McCann breached his duties as a health care provider owed to Robert Joseph under the UHCMA, and (2) Whether Dr. McCann waived his statute of limitations defense, having disclosed during litigation that he acted fraudulently by concealing the true nature of his fitness for duty evaluation.[4] Under the circumstances, it clearly appears Mr. Joseph didn't discovery the doctor's fraud with the city until after his malpractice action against Dr. McCann commenced. The Defendant's motion for summary was certainly untimely and he waived the opportunity to dismiss the action at the outset. Meanwhile, Plaintiff's claim for negligence can be barred. Honestly, Plaintiff would not and could not have it both ways. Either the act or omission of the doctor was willful and deliberate or it was mistaken. As of January 25, 2004, Plaintiff having discovered the origins of the doctors malpractice on January 25, 2004, it finally became a clear to Plaintiff that the origins of Dr. McCann's fraudulent report claiming he was unfit for duty was his part in the scheme initiated by the City to discharge him. McCann apparently believed he was free to enterprise with the city because as he thought he would be immune from prosecution under the theory of "no duty" because he was a "expert witness." (R. at 92). However, his arguments must fail because a duty is admitted by his contract and consent he had Mr. Joseph sign on February 3, 2000. (R. at 128).

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[4] On February 3, 2000, Plaintiff was expressly and impliedly led to believe that (1) Plaintiff was Defendant's patient, that he was acting ethically while performing Forensic Psychiatry services concerning Joseph's fitness for duty as a police officer, and that he was an "Independent Medical" Examiner. (R. at 128) Disclosed during this litigation without foreknowledge, Dr. McCann professes his true role was as SLC's expert witness. (R. at 92).

POINT TWO. THE COURTS HAVE BOTH ADDRESSED THE LEGISLATIVE INTENT OF THE "WITHIN TWO, BUT NOT MORE THAN FOUR" LANGUAGE OF SECTION 78-14-4(1) WITH DIFFERENT RESULTS.

In this matter, Robert Joseph is entitled to a reversal of the statute of limitations claim. As for the "no duty" issue that question can be reversed too as that is a question proper for the jury in light of fraudulent concealment. In *Bank One Utah N.A. v. West Jordan City*, 54 P.3d 135 (Utah Ct. App. 2002), surprisingly, a products liability case, offers clarification and direction for this Court to follow concerning statute of limitations issues in malpractice actions. The Court reasoned:

> As a general matter, "'"where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent. Rather, we are guided by the rule that a statute should generally be construed according to its plain language."'" *Sorenson Ranch School v. Oram,* 2001 UT App 354, ¶ 8, 36 P.3d 528 (citations omitted). Therefore, the particular language used in a statute setting a limitation period has proved critical to proper interpretation of the statute. *See McDougal v. Weed,* 945 P.2d 175, 177 & n. 1 (Utah Ct. App. 1997); *Aragon,* 857 P.2d at 252-53.
>
> In *McDougal,* we interpreted the language of the Utah Healthcare Malpractice Act, Utah Code Ann. § 78-14-4 (1996), which provided in relevant part as follows:
>
> > No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the *injury,* whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence . . . .
>
> *McDougal,* 945 P.2d at 176-77 (quoting Utah Code Ann. § 78-14-4 (1996)) (emphasis in original). At issue in that case was whether the "statute of limitations [was] tolled until the time the plaintiff discover[ed], or through the use of reasonable diligence should have discovered, both the existence of the recoverable injury *and* the defendant's identity." *Id.* at 176 (emphasis in original). We concluded that section 78-14-4 did "not require that the statute of limitations be tolled until the identity of the tortfeasor [had been] discovered or should have been discovered." *Id.* at 177. This was because "the [relevant] statutory language clearly set[ ] the moment the 'patient discovers ... the *injury*' as the triggering

> moment for the limitations period." *Id.* (quoting Utah Code Ann. § 78-14-4(1) (1996)) (emphasis added). Thus, by its plain language, the statute made clear that identifying the party responsible for the injury was not a prerequisite to the limitation period beginning to run.

Id. In this matter, Mr. Joseph claims that the defendant deliberately concealed the origins of his malpractice – a material omission is just as fraudulent as a misrepresentation. The trial court in this matter, has ruled consistent with *McDougal.* However, the Utah Supreme Court in *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327 (Utah 1997) seems to agree with Mr. Joseph on this issue that fraudulent concealment can toll the statute of limitations period. The Court concluded:

> In conclusion, we hold that Shelly's family's wrongful death claims are governed by the two-year statute of limitations for medical malpractice actions contained in section 78-14-4 of the Utah Code. We further conclude that the limitations period starts running when the patient or plaintiff discovers, or through the exercise of due diligence should have discovered, the underlying injury and its origins in medical malpractice.

Id., at 337. That opinion appears to dynamically oppose *McDougal* and arguably is precedential. Clearly in this light, in light of *Jensen* it would appear Mr. Joseph's claims should be remanded for this Court to determine whether Mr. Joseph's was entitled to present his claim for factual findings whether fraudulent concealment was involved and sufficiently tolled the claim. In this matter, there is enough facts present before the court for this court to decide no whether fraudulent concealment was involved.[5] Moreover, pursuant to *Liberty Lobby* , the trial court

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[5] McCann's Exhibit "D" identified to Joseph on February 3, 2000 that he was performing a fitness for duty evaluation on Joseph at the city's request, that Joseph was his patient and needed Joseph's consent to release a copy of the evaluation report to SLC, and that he would conduct himself ethically according to the Ethical Guidelines for the Practice of Forensic Psychiatry. (R. at 128). Nothing was mentioned that he was a servant of the SLC and that he was acting as an "expert witness" for the city until litigation and the filing of the motion for summary judgment on July 7, 2004. R. at 82; 92). Also, Dr. McCann assisted in the material concealment of "CONFIDENTIAL" material that would have suggested his role otherwise than what was represented to him on February 3, 2000. Not until discovery did McCann disclose Lyn Creswell's "Confidential" letter. That disclosure occurred on January 25, 2004 – well after litigation commenced but within four years of

should have determined that a jury could find in Mr. Joseph's favor. In this matter it is clear from a review of Dr. McCann's original evaluation that a concealment of the origins of the doctor's malpractice was present. Here, the original evaluation failed to identify the "confidential" letter from Salt Lake City Attorney Lyn Creswell. Certainly had that fact been disclosed by its timely disclosure on the report of materials considered, Mr. Joseph (1) could have addressed it and defended it at that time with the doctor or his employer, Salt Lake City before being discharged; (2) it would have been addressed at the time of his appeal to Civil Service; (3) it would have been discussed on appellate review to the Court of Appeals; (4) it would have been included in either petitions for certiorari with either Supreme Courts. None of those things occurred. Interestingly, what is also obvious was that neither the City nor Dr. McCann ever disclosed it to Mr. Joseph. The only one who eventually did was Dr. McCann, but only during the course of this lawsuit. The other disclosure made aware to Joseph during litigation was the fact that Dr. McCann did not act as Joseph's health care provider for purposes of the UHCMA. Rather, McCann alleged for the first time in litigation that he was a "expert witness" for SLC and owed no duty to Joseph whatsoever. (R. at 92).

Because of McCann's non-disclosures by both Dr. McCann and the City that is prima facie evidence of a conspiracy to conceal the fact from Mr. Joseph. A reasonable jury can find in Robert Joseph's favor against McCann. Joseph's position is that both false representations and material omissions were made by Dr. McCann. Material omissions are the same as false misrepresentation. A finding of fraud must be based on the existence of all its essential elements, i. e., the making of false representation concerning a presently existing material fact which

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February 3, 2000. (R. at 195; T. at 15-16).

represent or either knew to be false or made recklessly without sufficient knowledge, or the omission of material fact when there is a duty to disclose, for the purpose of inducing action on part of the other party, with actual, justifiable reliance resulting in damage to that party; fraud must be shown by clear and convincing proof and will not lie in mere suspicion or innuendo. *See, Taylor v. Gasor, Inc.*, 607 P.2d 293 (Utah 1980); *also see, Farmers' & Merchants' Sav. Bank v. Jensen*, 64 Utah 609, 232 P. 1084, 1087 (Utah 1924) ("Fraud is any act, concealment, or omission used to cheat or deceive another.").

In this matter, it is clearly a disputed fact whether Dr. McCann deceived Mr. Joseph. The deception acted as both a basis for liability under the UHCMA and for tolling of the statute of limitations under the UHCMA, pursuant to section 78-14-4(1)(b). That section reads, in pertinent part:

> (1) . . . .
>
> > (b) In an action where it is alleged that a patient[6] has been prevented from discovering misconduct ob the part of a health care provider[7] BECAUSE that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

Utah Code Ann. § 78-14-4 (2005). In this matter ,as stated above, Defendant did affirmatively act to conceal the true nature of his retention by the City to act as its "expert witness," contrary to his representation that Joseph was a "patient" of his and that he would be independent and ethical

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[6] It is an undisputed fact that McCann represented to Joseph, Joseph was McCann's "patient." (R. at 128). (ATTACHMENT E)

[7] It is an undisputed fact that McCann held himself out to Joseph expressly and impliedly by reference to Utah Code Ann. § 78-25-25, to be Joseph's health care provider in the same contract and consent. (R. at 128). (ATTACHMENT E)

(yielding to the guidelines of the profession for conduct forensic psychiatry). (R. at 128). (ATTACHMENT E). In addition, the doctor did not reveal, discuss or otherwise disclose the existence of "CONFIDENTIAL" letters from Lyn Creswell. (R. at 193). Clearly, as a matter of law, Joseph is entitled to a remand and should be allowed to proceed to trial. **In considering summary judgment the court does not weigh the evidence and determine the truth of the matter. Rather, this court should inquires whether a reasonable jury, faced with the evidence presented, a jury could return a verdict for Robert Joseph.** *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

CONCLUSION

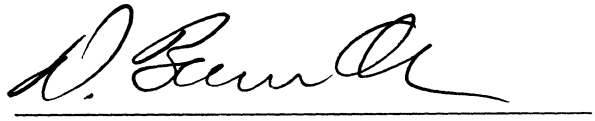
Based upon the foregoing, summary judgment should be reversed and the matter remanded consistent with the points raised in this brief. The Defendant, David L. McCann, M.D., F.A.P.A., by his own contract and consent form and admissions expressed and implied therein that he was a health care provider subject to Utah Code Ann. §§ 78-25-25, and 78-14-3. Also, by further admission, Mr. Joseph was McCann's "patient" expressly so stated in Defendant's Exhibit "D." (ATTACHMENT E).

Also, because of Dr. McCann's actions concealing the true nature of his employ–that he was retained by SLC to service as SLC's "expert witness" rather than conduct himself independently and impartially as he suggested in the Defendant's Exhibit "D." (ATTACHMENT E) He also affirmatively concealed "confidential" material from Lyn Creswell that would have provided Joseph reasonable notice that he was acting tortuous and that for the purpose of the

statute of limitations in Section 78-14-4 was on notice that to commence litigation within two years of the evaluation's report, dated February 28, 2000. Plaintiff commencement of litigation when he did was deservingly justified and reasonable under the circumstances. Pursuant to Section 78-14-4(1)(b), the statute of limitations was tolled through Dr. McCann's concealments. Because Mr. Joseph discovered the nature of his tort during litigation, the statute of limitation is not an issue. The discovery of Dr. McCann's concealment of the Lyn Creswell letter occurred on January 25, 2004. The discovery of Dr. McCann's true employment to act as the City's "expert witness" was not until July 7, 2004. The lawsuit at hand was commenced on October 14, 2003 upon notice of intent to commence being perfected on April 23, 2003 (after previous defective attempts).

RESPECTFULLY SUBMITTED this 8th day of March, 2006.

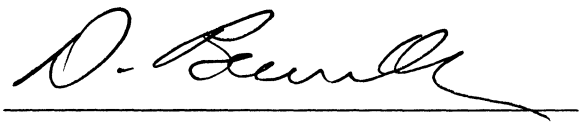
D. BRUCE OLIVER, L.L.C.



D. BRUCE OLIVER
Attorney for Appellant and Defendant

CERTIFICATE OF MAILING

I, D. Bruce Oliver, hereby certify that on this 8th day of March, 2006, I served a copy of the foregoing **BRIEF OF APPELLANT** upon the counsel for the Appellee in this matter, by mailing it to the State of Utah by first class mail with sufficient postage prepaid to the following address: J. Anthony Eyre, KIPP & CHRISTIAN, P.C., 10 Exchange Place, 4th Floor, Salt Lake City, Utah 84111.



ATTACHMENT A

Signed

J. ANTHONY EYRE – #1022
KIPP AND CHRISTIAN, P.C.
Attorney for David L. McCann, M.D.
Fourth Floor
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801)521-3773

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH, SALT LAKE DEPARTMENT

ROBERT L. JOSEPH, an individual, Plaintiff, vs. DAVID L. McCANN, M.D., F.A.P.A., an individual, Defendant.	: : : : : :	**ORDER OF DISMISSAL WITH PREJUDICE** Civil No. 030922636 Judge Judith S. Atherton

The Motion for Summary Judgment of the Defendant, David L. McCann, M.D. came on for hearing before the Court on January 27, 2004. Plaintiff, Robert L. Joseph was represented by his attorney, D. Bruce Oliver; and the Defendant, David L. McCann, M.D. was represented by his attorney, J. Anthony Eyre. The Court having considered the record of the case, including the Memoranda of the parties; having heard oral argument from

counsel; being fully advised in the premises; and, having stated in open Court the decision of the Court:

IT IS HEREBY ORDERED as follows:

The Motion for Summary Judgment of Defendant, David L. McCann, M.D. is granted and Plaintiff's action against him is dismissed with prejudice on the following alternative grounds:

(a) Defendant, David L. McCann, M.D. owed no legal duty to Plaintiff from which a legal action could be commenced; and,

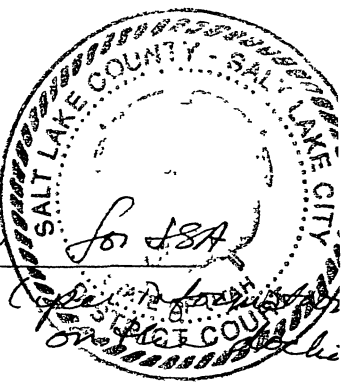
(b) The claim of Plaintiff against Defendant, David L. McCann, M.D. is barred by the two-year statute of limitations contained in § 78-14-4, U.C.A.

DATED this 25 day of April, 2005.

BY THE COURT:

Ann Boyden for JSA

JUDITH S. ATHERTON
District Court Judge



APPROVED AS TO FORM:

D. Bruce Oliver

D. BRUCE OLIVER
Attorney for Plaintiff

ATTACHMENT B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT L. JOSEPH, an individual, : MEMORANDUM DECISION AND ORDER

Plaintiff, : CASE NO. 030922636

vs. :

DAVID L. McCANN, M.D., F.A.P.A., an individual, :

Defendant. :

This matter is before the Court on plaintiff's Motion to Alter or Amend Judgment. On January 27, 2005, this Court granted defendant's Motion for Summary Judgment against plaintiff and dismissed plaintiff's Complaint with prejudice. At that time, this Court found that the statute of limitations had run. In his Motion to Alter or Amend Judgment, plaintiff once again argues the issue of the running of the statute of limitations. Plaintiff raises no new issues regarding the statute of limitations in his Motion to Alter or Amend, nor does he allege any legal error. He simply seeks to have this Court reconsider its ruling. This Court finds no basis to do so.

Therefore, plaintiff's Motion to Alter or Amend Judgment is denied.

Dated this 19 day of September, 2005.

JUDITH S. ATHERTON
DISTRICT COURT JUDGE

ATTACHMENT C

court's denial of Ms. Nuñez's motion to amend and remand for further proceedings consistent with this opinion.

¶ 38 I CONCUR: JAMES Z. DAVIS, Judge.

ORME, Judge (concurring specially):

¶ 39 I concur in the court's opinion, but wish to register a concern.

¶ 40 In the procedural posture of this case, Dr. Albo was entitled to summary judgment with respect to his individual liability. The very reason he is off the hook personally—he demonstrated in moving for summary judgment that anything he did, he did in the course and scope of his employment as an employee of the University—seals the responsibility of the University to answer for any negligence in the course of Dr. Albo's treatment of Plaintiff.

¶ 41 That having been said, it should be noted that it would not have been at all clear to Plaintiff that Dr. Albo was rendering treatment to her as a University employee. She visited him not at the University Hospital or any of the ancillary buildings, but at a private office off campus, adjacent to Salt Lake Regional Hospital—a hospital at which Dr. Albo also had privileges, a hospital which covered the larger portion of his secretary's salary, and a hospital at which many of his patient records were kept. Neither University medical students nor University Hospital interns or residents observed or participated in any of the procedures performed by Dr. Albo on Plaintiff. The sclerosing agent used by Dr. Albo was not secured from the supplies of University Hospital, but rather was procured in Italy by his daughter. (Apparently the sclerosing agent has not been approved for use in this country by the Food and Drug Administration.)

¶ 42 While it is clear given the record in this case that Dr. Albo was in fact a University employee who treated Plaintiff in the course of that employment as it was broadly defined by the University, it is also clear this would have come as a surprise to Plaintiff. Indeed, it is almost as though Dr. Albo and/or the University preferred that his status not come to Plaintiff's attention until long after she had been treated. Perhaps clear, unambiguous, and early disclosure that a treating physician enjoys the protection of the Utah Governmental Immunity Act is not good for business.

¶ 43 Surely courts will look askance, as we have done here, at any effort to obscure the University's role if that effort is coupled with a later attempt to avoid responsibility altogether. Such a strategy runs something like this: You cannot hold the doctor personally liable because he is an employee of the University and did this work in the course of that employment. And you cannot hold the University responsible because your notice of claim was directed to the doctor rather than the University. Moreover, it is inconsequential that we wanted him to seem like any ol' doctor in private practice rather than a University professor or state employee so that you would not worry too much about the remedies available to you in the event of malpractice and thus are largely responsible for your focusing on him initially rather than the University.

¶ 44 The main opinion's scholarly and well-reasoned discussion about the adequacy of the notice of claim and the "relation back" doctrine avoids this inequitable result by permitting Plaintiff to amend her complaint and proceed against the University as Dr. Albo's employer.

2002 UT App 254

Robert L. JOSEPH, Petitioner,

v.

SALT LAKE CITY CIVIL SERVICE COMMISSION, Salt Lake City Corporation, Salt Lake City Police Department, and the Chief of Police, Respondents.

No. 20010399-CA.

Court of Appeals of Utah.

July 26, 2002.

Former police officer appealed from order of the city civil service commission dis-

missing administrative appeal of his termination following officer's failure to comply with city's discovery requirements. The Court of Appeals, Thorne, J., held that dismissal of officer's appeal for failure to comply with discovery requirements did not violate officer's due process right to a post-deprivation hearing, even in absence of a formal discovery order.

Affirmed.

1. **Administrative Law and Procedure** ⇐758

Court of Appeals will reverse an adjudicative body's decision to levy discovery sanctions only in the face of a clear abuse of discretion.

2. **Appeal and Error** ⇐23

While the Court of Appeals is generally limited in its authority to address issues sua sponte, when the issue is jurisdictional the Court is under no such limitation.

3. **Courts** ⇐248

In the absence of a specific statute granting the Court of Appeals jurisdiction over subject matter, it has no jurisdiction.

4. **Municipal Corporations** ⇐185(12)

Court of Appeals had jurisdiction to review finding of city civil service commission denying former police officer's motion to strike its order of dismissal of officer's appeal of his termination, given express grant of jurisdiction to the Court for specific purpose of reviewing decisions made by municipal commissions. U.C.A.1953 § 10-3-1012.5 (1999).

5. **Constitutional Law** ⇐278.4(5)

Post-deprivation procedures implemented by civil service commission for failure to comply with discovery, while not constitutionally guaranteed, must comport with due process requirements providing for a fair hearing. U.S.C.A. Const.Amend. 14.

6. **Constitutional Law** ⇐251.6

The fundamental requirement of due process is the opportunity to be heard, at a meaningful time and in a meaningful manner, and, when this opportunity is granted a complainant, who chooses not to exercise it, that complainant cannot later plead a denial of procedural due process. U.S.C.A. Const. Amend. 14.

7. **Administrative Law and Procedure** ⇐311

While local administrative bodies are not strictly bound by the formal rules of evidence and procedure, absent any contrary direction, certain rules, including the rules governing discovery, are clearly applicable to such proceedings. Rules Civ.Proc., Rule 81(a).

8. **Administrative Law and Procedure** ⇐466

When an administrative agency determines that a party has not complied with legitimate discovery requests due to willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process, the agency acts within its discretion in imposing sanctions.

9. **Administrative Law and Procedure** ⇐466

The choice of an appropriate discovery sanction including the entry of default against the noncomplying party is primarily the responsibility of an administrative agency.

10. **Constitutional Law** ⇐278.4(5)
Municipal Corporations ⇐185(12)

Dismissal of former police officer's appeal of his employment termination for failure to comply with discovery requirements did not violate officer's due process right to a post-deprivation hearing before city civil service commission; officer not only ignored at least seven requests from the city over the course of ten months, and admitted fault in failing to produce the requested material but, thereafter, failed to avail himself of one final opportunity to comply with city's request for the documents. U.S.C.A. Const.Amend. 14.

11. **Municipal Corporations** ⇐185(8)

While a terminated municipal employee has a statutory right to a post-deprivation hearing, that right, absent contrary rules adopted by the civil service commission, is tempered by the employee's duty to comply

with, or at the very least respond to, a properly issued discovery request, and should the servant fail in that duty, and the commission determine that the failure was the product of willfulness, bad faith, fault, or persistent dilatory tactics, the commission may, at its discretion, levy sanctions for the failure, including dismissal. U.C.A.1953 § 10-3-1012 (1999).

12. Municipal Corporations ⇐185(12)

Absence of a formal discovery order did not preclude city civil service commission from dismissing former police officers' appeal of his employment termination for failure to comply with discovery requirements, where there was no contention that city failed to properly serve officer with any of its discovery requests, officer voluntarily entered into a stipulation wherein he admitted fault in failing to respond to city's discovery requests, and acknowledged that additional failure to respond would result in renewal of city's dismissal motion, but officer was aware that commission adopted the stipulation and entered additional order dismissing officer's appeal should he fail to timely produce requested discovery items.

13. Administrative Law and Procedure ⇐466

An administrative agency is not required to issue an order compelling discovery prior to considering sanctions; it is enough that a notice of the taking of a deposition or a request for inspection has been properly served on the party.

14. Administrative Law and Procedure ⇐513

Although parties deserve the opportunity to be heard, dismissal of an appeal before an administrative agency is appropriate when a party pursues a claim in a manner that abuses opportunity to respond to properly served notice of the taking of a deposition or a request for inspection.

15. Municipal Corporations ⇐185(12)

Former police officer's claims that penalty of dismissal of appeal of his employment termination was disproportionate to his failure to comply with discovery requests, that the city civil service commission failed to consider any other reasonable sanction, that the discovery material requested by city was irrelevant, and that commission's reliance on advice of city attorney created a conflict of interest, were waived, where officer failed to raise issues with the commission.

Robert L. Joseph, Sandy, Petitioner Pro Se.

Martha S. Stonebrook, Salt Lake City Law Department, Salt Lake City, for Respondents.

Before Judges BILLINGS, GREENWOOD, and THORNE.

OPINION

THORNE, Judge:

¶ 1 Robert L. Joseph appeals from an order of the Salt Lake City Civil Service Commission (the Commission) dismissing his administrative appeal following his repeated failure to comply with discovery requirements. We affirm.

BACKGROUND

¶ 2 In March of 1999, Joseph was involved in an incident that resulted in the Salt Lake City Police Department (the City) determining that he had acted unprofessionally and had violated the City's deadly force policy. While this finding was later affirmed by the Commission, Joseph was permitted to continue his employment pending the results of a fitness for duty examination. Thus, Joseph was examined by Dr. David McCann, who, in March of 2000, submitted to the City the following conclusions regarding Joseph:

> [He] has Disordered Personality Traits which have contributed to him placing himself in jeopardy in the shooting incident and in other incidents. Officer Joseph's personality traits have caused him to be excessively self-centered and unwilling to learn from peers or superiors. His personality traits are likely to lead him to increased isolation and alienation from appropriate professional supervision and the needs of the citizens of Salt Lake City. Personality traits similar to those of Offi-

> cer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision or disciplinary action. His personality traits cause an increased risk for harm to himself, to other officers and to the citizens of Salt Lake City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer.

Based at least in part on this evaluation, on March 31, 2000, the City's Chief of Police, Mac Connole, terminated Joseph's employment. Joseph appealed the City's decision to terminate his employment to the Commission.

¶ 3 Soon after learning of the appeal, the City requested certain documents and materials known or suspected to be in Joseph's possession. Joseph, however, neither proffered the requested discovery materials nor did he petition the Commission for protection from the request. Over the course of the next ten months, the City repeatedly renewed its request, which Joseph ignored on every occasion. Frustrated with Joseph's refusal to cooperate, the City filed a motion to dismiss as a sanction for Joseph's inaction. This finally roused Joseph to act.

¶ 4 To stave off possible dismissal, Joseph, through counsel, entered into a stipulation with the City. Joseph agreed to supply *all* of the requested material within fifteen days or face renewal of the dismissal motion, likely ending his appeal. Following a hearing on the proposed agreement, the Commission adopted the stipulation and specifically informed Joseph's attorney that failure to comply with the clear terms of the agreement would result in his appeal being dismissed with prejudice. Nonetheless, Joseph failed to timely produce the requested material, thereby violating the terms of the stipulation.

¶ 5 The City subsequently renewed its request for dismissal, which the Commission readily granted on April 9, 2001. Then, after a hearing on Joseph's motion to strike the order of dismissal, the Commission found that Joseph had presented no good cause to explain his failure to comply with the terms of the stipulation and denied his motion. Joseph now appeals.

ISSUE AND STANDARD OF REVIEW

¶ 6 While Joseph submits several arguments for our review, only one is properly before this court.

[1] ¶ 7 Joseph argues that the Commission erred in dismissing his appeal as a discovery sanction. We will reverse an adjudicative body's decision to levy discovery sanctions only in the face of a clear abuse of discretion. *See Hales v. Oldroyd*, 2000 UT App 75,¶ 15, 999 P.2d 588.

ANALYSIS

[2, 3] ¶ 8 Prior to addressing Joseph's claim, we must first determine whether this court is properly vested with jurisdiction over his claim. While we are generally limited in our authority to address issues sua sponte, *see In re R.N.J.*, 908 P.2d 345, 347 (Utah Ct.App.1995) ("if a [party] has not raised an issue on appeal, we may not consider the issue sua sponte" (quoting *State v. Rodriguez*, 841 P.2d 1228, 1229 (Utah Ct. App.1992)) (alteration in original)), when the issue is jurisdictional we are under no such limitation. *See id.* "[T]he jurisdiction of the Court of Appeals ... must be provided by statute." *DeBry v. Salt Lake County*, 764 P.2d 627, 627 (Utah Ct.App.1988) (citing Utah Const. art. VIII, § 5). In the absence of a specific statute granting this court jurisdiction over the subject matter, we have no jurisdiction. *See Barney v. Division of Occupational & Prof'l. Licensing*, 828 P.2d 542, 543–44 (Utah Ct.App.1992); *DeBry*, 764 P.2d at 628.

[4] ¶ 9 Here, were we restricted to the jurisdictional boundaries found in Utah Code Ann. § 78–2a–3(2)(b)(i) (Supp.2001) (granting this court jurisdiction over appeals from the district court's review of "adjudicative proceedings of agencies of political subdivisions of the state or other local agencies"), we would not have jurisdiction and would be forced to dismiss the petition. *See Barney*, 828 P.2d at 544. However, Utah Code Ann. § 10–3–1012.5 (1999) provides an express grant of jurisdiction to this court for the specific purpose of reviewing decisions made

by municipal commissions.[1] Therefore, because the Legislature has provided a specific statute granting this court jurisdiction, we conclude that we have jurisdiction and address Joseph's claim on appeal.

[5–7] ¶ 10 Joseph first argues that the discovery sanction levied by the Commission violates his due process right to a full hearing before the Commission. "Post-deprivation procedures, while not constitutionally guaranteed, must comport with due process requirements providing for a fair hearing." *Lucas v. Murray City Civil Serv. Comm'n*, 949 P.2d 746, 753 (Utah Ct.App.1997). " 'The fundamental requirement of due process is the opportunity to be heard, at a meaningful time and in a meaningful manner, and, *when this opportunity is granted a complainant, who chooses not to exercise it, that complainant cannot later plead a denial of procedural due process.*' " *Utah Dept. of Trans. v. Osguthorpe*, 892 P.2d 4, 8 (Utah 1995) (citation omitted). Moreover, while local administrative bodies are not strictly bound by the formal rules of evidence and procedure, *see Lucas*, 949 P.2d at 755, absent any contrary direction, certain rules, including the rules governing discovery, are clearly applicable to such proceedings. *See* Utah R. Civ. P. 81(a).

[8, 9] ¶ 11 When an administrative agency determines that a party has not complied with legitimate discovery requests due to " 'willfulness, bad faith, ... fault, or persistent dilatory tactics frustrating the judicial process,' " the agency acts within its discretion in imposing sanctions. *Hales v. Oldroyd*, 2000 UT App 75,¶ 16, 999 P.2d 588 (citation omitted). " '[T]he choice of an appropriate discovery sanction [including the entry of default against the noncomplying party] is primarily the responsibility of the [agency],' " and "we have long held that we will not interfere [with this choice] unless ' "abuse of that discretion [is] clearly shown." ' " *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997) (citations omitted) (fifth alteration in original).

[10, 11] ¶ 12 Joseph argues that the meaning behind "the opportunity to be heard, at a meaningful time and in a meaningful manner," *Osguthorpe*, 892 P.2d at 8, in this context, immunizes him from dismissal, regardless of his conduct. He is incorrect. While we agree that Joseph has a statutory right to a post-deprivation hearing, *see* Utah Code Ann. § 10–3–1012 (1999); *Lucas*, 949 P.2d at 753, this right, absent contrary rules adopted by the Commission, is tempered by the petitioner's duty to comply with, or at the very least respond to, a properly issued discovery request. Should the petitioner fail in this duty, and the Commission determine that the failure was the product of "willfulness, bad faith, ... fault, or persistent dilatory tactics," *Oldroyd*, 2000 UT App 75 at ¶ 16, 999 P.2d 588, the Commission may, at its discretion, levy sanctions for the failure, including dismissal.

¶ 13 Here, there is no question that Joseph failed to comply with the City's repeated discovery requests. Joseph ignored at least seven requests from the City over the course of ten months. Then, in the face of the City's motion to dismiss, Joseph essentially admitted to fault in failing to produce the requested material, and acknowledged that dismissal would result should he fail again. Based on Joseph's subsequent failure to comply, and following Joseph's admission of fault, the Commission dismissed Joseph's appeal.

¶ 14 After reviewing the record, we conclude that not only did Joseph stipulate to fault regarding his failure to comply with the requested discovery at the stipulation hearing, Joseph's attorney also admitted to being "somewhat dilatory" regarding the City's discovery requests. The Commission, therefore, had an ample basis to justify sanctioning Joseph for his continued failure to comply with the City's discovery requests. *See Oldroyd*, 2000 UT App 75 at ¶ 31, 999 P.2d 588; *see also Osguthorpe*, 892 P.2d at 8. Moreover, after accepting Joseph's initial acknowledgment of fault, the Commission chose to extend Joseph one final opportunity to comply. Joseph failed to avail himself of

1. We note that while Utah Code Ann § 10–3–1012.5 (1999) is titled "Appeal to district court—Scope of review," its plain language vests jurisdiction over "[a]ny final action or order of the [municipal] commission" in this court

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that opportunity. Accordingly, we conclude that the Commission did not violate Joseph's due process right to a post-deprivation hearing.

[12–14] ¶ 15 Joseph next argues that the absence of a formal discovery order is determinative. However, an agency is not required to issue an order compelling discovery prior to considering sanctions. *See Tuck v Godfrey*, 1999 UT App 127,¶ 19, 981 P.2d 407. " 'It is enough that a notice of the taking of a deposition or a request for inspection has been properly served on the party.' " *Id* (citation omitted). Furthermore, "[a]lthough parties deserve the opportunity to be heard, 'dismissal ... is appropriate when a party pursues a claim in a manner that abuses that opportunity.' " *Oldroyd*, 2000 UT App 75 at ¶ 31, 999 P.2d 588.

¶ 16 There is no contention that the City failed to properly serve Joseph with any of its discovery requests. Joseph, in fact, admits having received most, if not all, of the requests. Joseph voluntarily entered into a stipulation with the City wherein he essentially admitted he was at fault for the failure to respond to the City's discovery requests. He further stipulated that any additional failure on his part would result in the renewal of the City's motion to dismiss. Additionally, both Joseph and his attorney were well aware that the Commission had adopted the stipulation and had entered an additional order dismissing Joseph's appeal should he fail to timely produce the requested discovery items.

¶ 17 After reviewing the record, we conclude that not only was Joseph properly served with several discovery requests, any one of which was sufficient to provide Joseph with the notice he argues he did not receive, but also that Joseph was fully aware of the specific penalty he faced should he *again* fail to comply with the City's discovery requests. Therefore, Joseph's second argument fails.

[15] ¶ 18 Joseph raises several other issues on appeal. However, because he failed to raise these issues with the Commission, we will not address them here.[2] *See State v. Holgate*, 2000 UT 74,¶ 11, 10 P.3d 346 (stating "[a]s a general rule, claims not raised before the trial court may not be raised on appeal"); *Oldroyd*, 2000 UT App 75 at ¶ 24, 999 P.2d 588 (stating " '[a]ny challenge to the merits of a discovery request must be timely filed and put before the trial court, or the claim will be waived' "(citation omitted)); *Godfrey*, 1999 UT App 127 at ¶ 24, 981 P.2d 407 (observing that a failure to raise an objection to a discovery sanction waives the objection).

¶ 19 Accordingly, we affirm the Commission's order dismissing Joseph's appeal.

¶ 20 WE CONCUR: JUDITH M. BILLINGS, Associate Presiding Judge and PAMELA T. GREENWOOD, Judge.

2. Specifically, Joseph argues that the penalty of dismissal of his appeal was disproportionate to the conduct; that the Commission failed to consider any other reasonable sanction, that the discovery material requested by the City was irrelevant, and that the Commission's reliance on the advice of the City Attorney created a conflict of interest

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ATTACHMENT D

IN THE UTAH COURT OF APPEALS

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Robert L. Joseph, Petitioner, v. Salt Lake City Civil Service Commission; and Salt Lake City Corporation, Police Department, Respondents.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20001111-CA F I L E D (July 26, 2002) 2002 UT App 250

Original Proceeding in this Court

Attorneys: Robert L. Joseph, Sandy, Petitioner Pro Se
Martha S. Stonebrook, Salt Lake City, for Respondents

Before Judges Billings, Greenwood, and Thorne.

THORNE, Judge:

Robert L. Joseph appeals from a finding of the Salt Lake City Civil Service Commission (the Commission) affirming the Salt Lake City Police Department's (the Department) conclusion that Joseph acted unprofessionally and violated the Department's deadly force policy. We affirm.[1]

First, absent a demonstration of plain error or exceptional circumstances, we will not review claims that an appellant failed to first raise in the trial court. See State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346; State v. Brown, 948 P.2d 337, 343 (Utah 1997) (stating "'[i]f a party through counsel has made a conscious decision to refrain from objecting or has led the trial court into error, we will then decline to save that party from the error'" (citation omitted)). Therefore, we do not address Joseph's arguments concerning the following issues: (1) The

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1. During the pendency of this appeal, Joseph filed a fourteen page motion, wherein he requested relief from the Commission's judgment. Because we conclude that the Commission did not abuse its discretion, we find Joseph's motion to be without merit.

Commission's decision to exclude evidence concerning statements made during settlement negotiations between Joseph and the Department; (2) the Commission's actions concerning Joseph's request that the Department produce a crime scene videotape; (3) the admissibility of Darin Bell's transcript testimony; (4) the Commission's decision to exclude two charts from evidence; and (5) the proportionality of Joseph's punishment.

Joseph next argues that the evidence presented was insufficient to support the Commission's findings. To successfully challenge a factual finding, an appellant must first marshal the evidence supporting the finding. See Moon v. Moon, 1999 UT App 12, ¶24, 973 P.2d 431. Only then is he permitted to attempt to demonstrate why the finding is clearly erroneous. See id. "When an appellant fails to meet the heavy burden of marshaling the evidence, we assume[] that the record supports the findings of the trial court . . . ." Id. (citations and quotations omitted) (alteration in original). Here, Joseph does nothing more than reargue the evidence he relied upon before the Commission. Accordingly, because Joseph has failed to properly marshal the evidence, we conclude that the evidence was sufficient to support the Commission's findings that Joseph violated the Department's deadly force policy and that his use of deadly force was unjustified.[2]

Moreover, we review the Commission's findings only to determine whether the Commission "abused its discretion or exceeded its authority." Utah Code Ann. § 10-3-1012.5 (1999). After reviewing the record, we conclude that the Commission had ample evidence available to support its findings, including the following facts: (1) Joseph fired at least twice at the vehicle, as it was moving away from him and was no longer a threat to either Joseph or any possible bystanders; and (2) Joseph could not clearly see either the car or his surroundings as he was firing his weapon.

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2. Joseph also argues that the Commission violated its own rules concerning burdens of proof and proceeding; however, the thrust of this argument is that the evidence was not sufficient to support the Commission's finding. Accordingly, Joseph is required to first marshal all of the evidence supporting the finding, and only then is he permitted the opportunity to demonstrate that the evidence is insufficient to support the finding. See Brewer v. Denver & Rio Grande W.R.R., 2001 UT 77, ¶33, 31 P.3d 557. Because Joseph failed to properly marshal the evidence with respect to this claim, we assume the Commission's findings are correct.

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Third, while Joseph couches his fourth argument as a challenge to the Commission's admission into evidence statements that Joseph identifies as hearsay, the actual thrust of his argument is a challenge to the credibility of the witnesses. However, the Commission, as a local administrative body, is not strictly bound by the formal rules of evidence. See Lucas v. Murray City Civil Serv. Comm'n, 949 P.2d 746, 755 (Utah Ct. App. 1997). So long as the evidence admitted by the Commission was legally relevant and the Commission provided Joseph an opportunity to introduce evidence of his own, as well as the opportunity to cross-examine the City's witnesses and challenge their credibility, we will conclude that the Commission acted within the scope of their authority. See id. at 756. Moreover, we defer to the initial decision maker in assessments of credibility and evaluations of evidence. See Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997).

Having reviewed the record, we conclude that the Commission did not err in admitting into evidence the testimony challenged by Joseph on appeal.[3] The testimony was clearly relevant to the Commission's determinations, and the Commission gave Joseph the opportunity to present his own counter witnesses and to cross-examine the Department's witnesses. Additionally, the record clearly shows that the Commission examined all of the evidence placed before it prior to making its determination. Therefore, we conclude that the Commission's decision was well within its discretionary bounds.

Finally, because Joseph's remaining issues are without merit, we do not address these claims. Rather, we explain why each issue is without merit. See State v. Carter, 776 P.2d 886, 888-89 (Utah 1989).

First, the Commission ruled in favor of Joseph and excluded the letter written by Assistant District Attorney Richard Shepard. Therefore, the letter was never introduced as evidence during the hearing. Second, the Commission enforced Joseph's subpoena, ordering the Department to comply. Third, the Commission admitted into evidence documents concerning two previous unrelated shootings, and there is nothing in the record to indicate that the Commission failed to review these documents prior to concluding that Joseph acted out of policy. Fourth, there is nothing to support Joseph's contention that the Commission denied him the opportunity to introduce evidence of

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3. We can see nothing to suggest that Joseph objected to the testimony during the hearing. However, rather than disposing of this argument on preservation grounds, see State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346, we address it on the merits.

App. 3

the Department's bias, intent, or retaliatory motive regarding its determination that Joseph acted out of policy. Finally, the record does not support Joseph's allegation that the Commission allowed the Department to modify Chief Connole's original decision to include a finding of unprofessional conduct.

Accordingly, we affirm the Commission's decision.

William A. Thorne Jr., Judge

WE CONCUR:

Judith M. Billings,
Associate Presiding Judge

Pamela T. Greenwood, Judge

ATTACHMENT E

General Adult Psychiatry | Independent Medical Evaluations

Statement of Conditions
for
Independent Medical Evaluation

It is important that you understand and sign this statement before you meet with the doctor.

According to the Ethical Guidelines for the Practice of Forensic Psychiatry, patients must give consent to special circumstances of examination The following understanding is also necessary to maximize impartiality and objectivity

Unless you understand and sign this statement, DR. McCANN WILL NOT PROCEED WITH THE EXAMINATION If you do not wish to be examined under these conditions, contact the person who requested the examination prior to the date of your appointment with Dr McCann

* * *

I understand that SALT LAKE CITY CORP has requested that David L McCann, M D perform a psychiatric examination and provide a report at their expense Dr McCann is in independent private practice His opinion may be used to justify a change in compensation or job status, but no decisions about compensation or job status are made by Dr McCann In submitting to this examination I authorize Dr McCann to obtain information from any source or person he deems necessary to complete the report I understand Dr McCann begins all evaluations with the identified patient alone. Other persons may or may not be included at Dr. McCann's discretion. It is Dr. McCann's role to provide evaluation and not treatment. I understand that it is his policy to release the final report to the above named agency only This statement waives any right to my direct access or direct access by my legal counsel (Utah Code Ann, 78-25-25, 1953 as amended) to the medical records from Dr. McCann's office Reports may be requested from the above named person or agency. This statement does not prevent Dr David L McCann from participating in a deposition or other legal proceedings if requested by my attorney or providing specific information regarding findings relevant to needs for urgent medical care

SIGNED

WITNESS

2/3/00
DATE

PENCAD-Bayonne, N. J. DEPOSITION EXHIBIT 4

03-0797

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